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16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION

19
20 UNITED STATES OF AMERICA,

21 Plaintiff,

22 v.

23 ROBERT S. GORDON,

24 Defendant.

25 CASE NO. CR-01-20077-JF

26
27
28 **MEMORANDUM IN SUPPORT OF
VICTIM CISCO'S ENTITLEMENT TO
RESTITUTION PAYMENT FROM THE
GOVERNMENT PURSUANT TO FUNDS
POSTED BY GORDON**

E-FILE

Case No. CR-01-20077-JF

MEMORANDUM IN SUPPORT OF VICTIM CISCO'S ENTITLEMENT TO RESTITUTION PAYMENT
FROM THE GOVERNMENT

1 UNITED STATES OF AMERICA,
2 Plaintiff,
3 v.
4 REAL PROPERTY AT
5 1) 7900 BALD EAGLE DRIVE,
6 PARK CITY, UTAH; and
7 2) 7871 REDTAIL COURT,
8 PARK CITY, UTAH,
9 Defendant.

CASE NO. CV-02-2130 JF

10 CISCO SYSTEMS, INC.,
11 Plaintiff,
12 v.
13 ROBERT S. GORDON,
14 Defendant.

CASE NO. CV-02-01862-JF

Judge: The Honorable Jeremy Fogel

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1 I. Introduction

2 Gordon contends that the Plea Agreement requires the government to pay over to
3 Cisco the \$4M (plus) in restitution now affirmed on appeal and still owing, payment to be
4 made as required by the Plea Agreement from the remainder of the \$7M (plus) Gordon
5 turned over to the government in excess of the \$13M (plus) in undisputed restitution he
6 deposited with the government, which the government previously turned over to Cisco.

7 We understand the government's position (as represented at the last CMC on
8 December 16, 2005) to be that, even if Gordon is correct, Cisco is not entitled to receive
9 payment from the government of the restitution owing because Cisco is barred by the
10 terms of its Stipulation and the Final Order of Forfeiture.

11 Cisco submits this memorandum to rebut the claim by the government.

12 This Memorandum is submitted pursuant to provisions of the recently enacted
13 Crime Victim's Rights Act, 18 U.S.C. 3771 (2004) and this Court's order made during the
14 December 16, 2005 consolidated Case Management Conferences setting a hearing on
15 this matter for February 8, 2006.¹ Under the Act, all federal crime victims are now entitled
16 "to be reasonably heard at any public seating in the district court involving ... sentencing"
17 (§ 3771(a)(4)) and to "full and timely restitution as provided by law" (§ 3771(a)(6)).²

18 Cisco takes no position on Gordon's claim that the Plea Agreement obligates the
19 government to pay over to Cisco the restitution owing: We did not negotiate and are not
20 parties to the Plea Agreement. However, Cisco submits that if Gordon is correct, then
21 Cisco, as the third party beneficiary of the Plea Agreement, is entitled to payment from the
22 government because Cisco is not in any respect barred from receiving that restitution.

23 Cisco presents the issue of its entitlement now, rather than wait for a ruling on

24
25 ¹ That hearing was continued to March 22, 2006 by stipulation of the parties and further order of the Court.

26 ² The Act expressly authorizes the "crime victim's lawful representative (to) assert the victim's statutory
27 rights" (18 U.S.C. § 3771(d)(1)), provides that the district court shall decide the victim's rights "forthwith"; and
28 "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of
mandamus." (18 U.S.C. § 3771(d)(3) (October, 2004)). See, *Kenna v. U.S. District Court*, C.D. Cal., 2006
U.S. App. Lexis 1369 (9th Cir. 1/20/06).

1 Gordon's contention, because Cisco has been waiting for some four (4) years now for
2 payment, and, if Gordon's position is upheld, Cisco does not want to protract these
3 proceedings further by then having to set an additional briefing schedule and calendar a
4 further hearing on its entitlement.

5 **II. Summary of Argument**

6 Cisco's entitlement to payment by the government would not be barred because:

7 (1) The Final Order of Forfeiture could not, and so does not, bar Cisco's
8 Plea Agreement third party beneficiary claim here because under the applicable statute,
9 that kind of claim could not have been made in the forfeiture proceeding, and so the
10 Forfeiture Order barring further claims could not apply to it; and,

11 (2) Cisco's Stipulation to the entry of the Final Order released only the
12 constructive trust claim it made in its Petition, not any third party beneficiary claim.

13 **III. Argument**

14 **A. Nothing In the Forfeiture Order Bars Cisco's Entitlement**

15 The provision in the Final Order of Forfeiture ("Final Order") that "All other claims to
16 said funds ... are hereby barred forever" (Final Order, 2:9-10) is simply inapplicable to
17 Cisco's entitlement if Gordon's position is sustained.

18 If Gordon's position is accepted by the Court, Cisco, as third party beneficiary to the
19 Plea Agreement, would not then be making a claim that it has a property interest in the
20 forfeited funds themselves, which is the only kind of claim cognizable in a forfeiture
21 proceeding, but instead a claim based on a contractual obligation.

22 The criminal forfeiture statute, 21 U.S.C. 853(n)(6)(A), limits the kind of third party
23 claims that can be raised in a forfeiture proceeding to claims that: (1) the third party (here,
24 Cisco) had a "right, title or interest vested in the *petitioner rather than the defendant* at the
25 time of the acts which gave rise to the forfeiture ..." or (2) cases "where the third party
26 claims are *superior* to any right, title, or interest vested in the defendant." (Emphasis
27 supplied).

1 1. As to the first kind of claim cognizable under the statute (claims of
2 having one's own vested property interest in the material subject to forfeiture), here, if
3 Gordon succeeds in his present claim, Cisco's entitlement would:

4 a. not be one asserting a vested property interest in the forfeited
5 funds themselves, but instead, as already mentioned, would be solely as a *third party*
6 *beneficiary* of the Plea Agreement *contract*, and so would not have been cognizable in the
7 forfeiture proceeding³;

8 b. not be a claim of a property interest "vested" in Cisco "at the
9 time of the acts which gave rise to the forfeiture," as the statute requires, since Cisco's
10 entitlement would arise solely from the Plea Agreement, which was not executed until well
11 after Gordon's money laundering that gave rise to the forfeiture; and,

12 c. its entitlement would not be based on a claim of an interest of
13 its own "rather than the defendant," as the statute further requires, but would, instead, be a
14 claim entirely derivative of the defendant's interest.

15 2. As to the second kind of cognizable claim under the statute (claims of
16 having a property interest superior to the defendant's), Cisco's entitlement as third party
17 beneficiary would not have been cognizable in the forfeiture proceeding because it is not
18 an interest "superior" to the defendant's, as required. Indeed, as just pointed out, Cisco's
19 interest, as a third party beneficiary, would derive entirely from the defendant's interest.

20 3. In sum, if Gordon's position is accepted by the Court, Cisco would not
21 be claiming a legal interest in the forfeited funds themselves. Cisco's position is that if the
22 government has a contractual obligation to Gordon to pay over an amount equal to the
23 restitution owed by Gordon on the basis of the funds it held and which it then forfeited,
24 then Cisco, as a third party beneficiary of that contract, is entitled to receive that restitution.

25
26 3 We note that the Plea Agreement provides, not that the government pay over the forfeited funds
27 themselves, but instead "*an amount equal to* the value of (the) assets at the time of taking" (Plea
28 Agreement at p. 19, par. 15; emphasis supplied). The elements of a third party beneficiary claim
are: (1) a valid and binding intentional contract; and (2) with provisions which are for the benefit of
a third party. 13 Williston on Contracts § 37:23 (4th ed., 2005).

1 Accordingly, because Cisco's entitlement here would not have been a cognizable claim in
2 the forfeiture proceeding (not being a claim to the forfeited funds, as such, and otherwise
3 not being a qualified claim under the controlling statute), its entitlement now cannot be
4 deemed precluded by the provision in the Final Order of Forfeiture only barring further
5 claims to the forfeited funds themselves, and which otherwise meet the statutory
6 requirement set out in 21 U.S.C. 853 (n)(6)(A).⁴

7 **B. Cisco Never Released Any Third Party Beneficiary Entitlement to the
8 Funds**

9 If Gordon's claim is sustained, Cisco's entitlement to the restitution is not defeated
10 by anything in the claims release Cisco gave the government by its Stipulation.

11 **1. The Fact Record**

12 a. On March 11, 2003, the Court entered a Preliminary Order of
13 Forfeiture prescribing that funds totaling \$21,083.379.69 turned over by Gordon to the
14 government be forfeited as having been involved in illegal money laundering. (Preliminary
15 Order of Restitution and Forfeiture, 4:22-5:8) ("Preliminary Order").

16 The Preliminary Order further required that: (1) Upon the entry of a final
17 order of forfeiture, \$13,649,353.89 of these funds be paid over to Cisco as restitution (id. at
18 3:23-27).

19 b. On May 27, 2003, Cisco filed its Petition to Amend ... the
20 Preliminary Order ("Petition") pursuant to Cisco's claim of an interest in the \$7,444,025.80
21 balance held by the government for possible forfeiture pursuant to the Preliminary Order.
22 The sole and exclusive claim made by Cisco to these funds in its Petition was as follows:

23

24 ⁴ Cisco's entitlement as third party beneficiary not being cognizable in the forfeiture proceeding can
25 be further illustrated by the fundamental difference between that entitlement and the claim Cisco
made in its Petition. Cisco's Petition claim was that Cisco was the beneficiary of a constructive
trust imposed by law on the funds Gordon stole, the moment he stole them. Most of the cases
have held that such a claim meets all of requirements of 21 U.S.C. 853(n)(6)(A), above. See e.g.
United States v. Schwimmer, 968 F.2d 1579, 1582 (2nd Cir. 1992); *United States v. Herbawi*, 972
F.Supp. 171, 173-174 (W.D. N.Y. 1997) upholding constructive trust claims in forfeiture
proceedings. The authorities regarding constructive claims in forfeiture proceedings are collected
and analyzed in 53 Consumer Fin. L.Q. Rep. 16 (1999), at ftns. 147-154 and accomp. text.

1 that Gordon "breached his fiduciary duty to Cisco ... embezzling assets ... fraudulently
2 inducing Cisco to loan funds ... and engaging in stock trades upon inside information"
3 (Petition, 3:15-18); that the funds to be forfeited represented "either funds Gordon took
4 from Cisco or proceeds from his investing of those funds"; that therefore Gordon held
5 those funds in constructive trust in favor of Cisco; that because the constructive trust came
6 into being at the time the funds were wrongfully obtained by Gordon, Cisco's legal interest
7 became vested before the government's seizure (Petition, at 6:13-16), and therefore Cisco
8 was the legal owner of the \$7,444,025.80. (Petition, 6:9-16; 7:8-9).⁵

9 Nowhere in the Petition was any claim or any other reference made to *any*
10 *other basis* for Cisco's claim, and specifically, no claim was made based on the theory that
11 Gordon now advances: that, the government is obligated to pay over to Cisco restitution
12 on Gordon's behalf because the government promised him in the Plea Agreement that, to
13 the extent of the amount forfeited, it would pay up to an amount equal to the value the
14 embezzlement on the dates of taking insofar as needed to effect any further, later ordered
15 restitution.

16 c. On May 29, 2003, the government filed its Application for a
17 Final Order of Forfeiture, noting that the government and Cisco had stipulated that a final
18 order be entered. Nowhere in the government's Application or the government's Proposed
19 Final Order was there any reference purporting to release any claims by Cisco other than
20 the claim made *in its Petition*. That proposed order was, in pertinent part, as follows:

21 \$2,200,000.00 of the funds ... shall be disbursed to Cisco
22 Systems, pursuant to and in full satisfaction of its third party
23 petition filed herein and the Stipulation of the United States and
Cisco filed concurrently with this Application (Application, 2:13-
15; emphasis supplied)

24 d. The Stipulation itself provided, in pertinent part, that:
25 "\$2,200,200.00 of the funds ... shall be disbursed to Cisco in full satisfaction of all claims *in*
26 *said Petition*" (Stipulation, 1:27-26; emphasis supplied).

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⁵ Cisco and the government then settled the claim for \$2.2 million. (Final Order, 2:5-7)

e. Finally, the Court's Final Order of Forfeiture entered May 30, 2003 referred to the foregoing Application and Stipulation as prescribing, and the Court ordered that:

\$2,200,000.00 of the funds ... shall be disbursed to Cisco Systems, Inc. pursuant to and in full satisfaction of *its third party petition* filed herein and the Stipulation of the United States and Cisco filed concurrently with this Application⁶ (Final Order, 2:5-7; emphasis supplied).

In sum, Cisco agreed only to release the claim made *in its Petition*, and neither that agreement nor Cisco's Petition itself even remotely implicated the third party beneficiary entitlement to Cisco that would result if the Court sustains of Gordon's current claim.

2. In Law, as Well as in Fact, Cisco Released Only the Constructive Trust Claim Made in its Petition

The applicable law confirms the result of the fact record that the only claim Cisco released was the constructive trust claim it made in its Petition.

a. An unambiguous release must be construed and then enforced in accordance to its terms. 29 Williston on Contracts, § 73:7 (4th Ed., 2005). “[U]nambiguous, good faith settlements and plea agreements will be read according to their terms (and) any ambiguities or imprecise terms will be construed against the government.” (U.S. Attorneys Manual, Title 9 at 2237, citing *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) and *United States v. Field*, 766 F.2d 1161, 1168 (7th Cir. 1985).)

b. What we have here is a *specific* release, that is, a release restricted by its terms to claims or actions arising from specific events, transactions, or

⁶ This \$2.2M, with the \$13,649,353.89, which the Preliminary Order prescribed be paid over by the government to Cisco from the \$21,093,329.69 turned over to the government by Gordon, left \$5,243,976.20 forfeited to the government. Slightly over \$4M in restitution is currently owed, not including post-judgment interest.

1 injuries. 66 Am. Jur. 2d, Release § 29, citing *Fuku-Bonsai, Inc. v. E.I. DuPont De*
2 *Nemours & Co.*, 187 F.3d 1031 (9th Cir. 1999). Because this was not a general,
3 unrestricted release of all claims, it did not release any unknown claims⁷. See, *Casey v.*
4 *Proctor*, 59 Cal.2d 97, 109 (1963) (noting that it is only a *general* release of all claims that
5 can, absent statute such as Cal. Civil Code § 1542, result in the waiver of unknown
6 claims.)⁸

7 c. In addition to this being an unambiguous specific release, to the
8 extent there might be any hint otherwise, it is clear that because the scope of the release
9 would be construed against the government as having drafted it (*United States v.*
10 *Seckinger*, 397 U.S. 203, 210 (1970)), it will be accorded its literal meaning, releasing only
11 the particular claim made by Cisco in its Petition.

12

13 **C. Preclusion of Cisco's Entitlement Would Effect a Completely Untoward**
14 **Result**

15 If Gordon's position is sustained by the Court, the government's contention -- that
16 the Final Order or the Stipulation nevertheless precludes any entitlement by Cisco to
17 restitution -- would effect a most incongruous and thoroughly unjust result. For to sustain
18 this contention would mean that, notwithstanding that the government would be *required*
19 *by the Plea Agreement to pay over* the restitution to Cisco: (1) the government would
20 nevertheless get to not do so, *keeping* that amount, (2) which would, in turn, leave *Gordon*
21 obligated to pay Cisco, and (3) leave Cisco to pursue him civilly to pay what he had
22 *already paid* over to the government. Such an anomalous and unfair result confirms that it

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24

25 ⁷ Gordon's present claim -- that he does not owe Cisco anything further because, except for the
26 \$13M+ designated for restitution by the Preliminary Order, the assets he turned over to the
27 government were to be forfeited, but the government agreed to pay over to Cisco any later-
28 determined restitution up to an amount equal to the value of the embezzled assets on the date of
taking -- was a claim wholly unknown, to Cisco until December 2005, when Gordon raised it with
Cisco for the first time.

29

30 ⁸ Cal. Civil Code § 1542 provides that even a general release does not release unknown claims
31 unless the release expressly says so.

1 is neither the result required by applicable law nor the one contemplated by Gordon or the
2 government.

3 **IV. Conclusion**

4 If the Court finds that the government and Gordon agreed that the remaining
5 restitution would be paid over by the government to Cisco up to an amount equal to the
6 value of the embezzled assets on the date of taking, then the government is obligated to
7 Gordon to pay that restitution to Cisco; and Cisco, as the third party beneficiary to that
8 agreement, is fully entitled to receive it. As demonstrated above, nothing in the Final
9 Order, the Stipulation or the applicable law would preclude Cisco from receiving that
10 restitution still owing.

11

12 DATED: March 3, 2006

SIDEMAN & BANCROFT LLP

14 By: /s/ David P. Bancroft
15 David P. Bancroft
16 Attorneys for Plaintiff and Victim
17 CISCO SYSTEMS, INC.

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